

GEORGE GILCHRIST ET AL.

IBLA 90-470

Decided December 11, 1990

Appeal from a decision of the Bureau of Land Management District Manager, Tulsa, Oklahoma, cancelling wild and free-roaming horse and burro adoption agreements. NM47-04-90-1.

Decision placed in effect on an interim basis; case referred for a show cause hearing.

1. Rules of Practice: Appeals: Dismissal

Summary dismissal of an appeal for failure to timely serve a copy of the notice of appeal on the Solicitor is discretionary and a motion to dismiss is properly denied in the absence of any showing of prejudice.

2. Wild Free-Roaming Horses and Burros Act

Where evidence of record tends to show the condition of adopted horses and/or burros is such as to threaten their continued survival, the burden is upon the adopter challenging cancellation of the adoption agreement and repossession of the animals to show that the condition was not due to any conduct or neglect on his part. A hearing may be ordered where the record presents issues of material fact.

APPEARANCES: Chris Eulberg, Oklahoma City, Oklahoma, for appellants; Margaret C. Miller, Office of the Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

George Gilchrist and others 1/ have filed an appeal from a May 2, 1990, decision of the Bureau of Land Management (BLM) District Manager,

1/ The additional appellants are: Darla Sweatt, Lester Hamilton, Betty Hamilton, Jesse Coffey, and Billy Coffey. Each of the parties (with the apparent exception of Jesse Coffey) received a similar decision dated May 2, 1990. These individuals adopted a total of 18 animals, 12 burros and 6 horses.

Tulsa, Oklahoma. The decision addressed the private maintenance and care agreements signed by the recipients and dated November 13, 1989, regarding wild and free-roaming horses and burros. The animals were adopted by the recipients pursuant to the Wild Free-Roaming Horses and Burros Act of December 15, 1971, as amended, 16 U.S.C. §§ 1331-1340 (1988). The decision stated that the agreements are canceled based on the conclusion that the facilities used to house the animals were not in safe condition and that feed and water adequate to the nutritional requirements of the animals was not provided. The BLM decision noted that 6 of the 18 animals adopted by the recipients and housed by appellant Gilchrist had died. The decision also concluded that it is in the best interests of the animals that BLM retain possession of the surviving animals. 2/

It appears from the record that on February 9, 1990, BLM personnel repossessed 10 of the adopted animals due to BLM's belief that they were in poor condition. At that time, two adopted animals were left on the Gilchrist property where they were housed. Subsequent to issuance of the decision under appeal, BLM informed appellant Gilchrist by letter dated May 31, 1990, that it intended to repossess the two remaining animals. 3/ Appellants have opposed the repossession as a breach of their rights in this matter. Appellants contend the remaining animals are healthy. Further, they assert that the condition of the repossessed animals and the death of some of the adopted animals was due to a combination of severe weather and their malnourished state at the time of adoption from BLM.

Counsel for BLM has filed a motion for summary dismissal of this appeal on the ground that a copy of the notice of appeal was not served upon the Field Solicitor as required by regulation at 43 CFR 4.413. Further, BLM has filed a response to the appeal and a motion to place the decision of BLM into full force and effect pending resolution of this appeal. In support of that motion, BLM contends that the terms of the agreements under which the animals were adopted, as well as relevant regulations regarding care of the animals, were violated. It contends that with the advent of cold weather the safety of the two remaining adopted horses is threatened. In light of the motion to place the decision into full force and effect, we have given this matter expedited consideration.

[1] An appeal to the Board is subject to summary dismissal if the notice of appeal and/or statement of reasons is not served upon adverse

2/ Title to wild horses and burros covered by an adoption agreement remains with the Federal Government for at least one year after the agreement is executed and until a certificate of title is issued. 43 CFR 4750.4-1(a).

3/ In Thana Conk, 114 IBLA 263, 272 (1990), the Board noted the BLM Manual provision at 4760.2.22 (Release 4-95 Nov. 23, 1988) that directs that repossession shall be effectuated by the issuance of a written decision cancelling the private maintenance and care agreement. In this case, BLM repossessed 10 of the animals nearly 3 months prior to issuing decisions cancelling the agreements.

parties within the time required. 43 CFR 4.413(b); 43 CFR 4.402(b). Dismissal in such circumstances is discretionary rather than mandatory. See Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969). In this case, the Field Solicitor acknowledges notice of the appeal was received by May 31, 1990. The case file for this appeal was not even transmitted to the Board until July 30. In the absence of any apparent prejudice to BLM from the delay in notice to the Field Solicitor, we find that the motion to dismiss is properly denied.

Regarding the motion to place the BLM decision into effect, we note that the regulations authorize the Board to order that a decision under appeal or any part thereof may be placed in full force and effect immediately upon a finding that "the public interest requires" such action. 43 CFR 4.21(a). Consideration of the public interest in this matter requires examination of the merits of this controversy.

The humane treatment of adopted horses is clearly mandated by the statute and the implementing regulations. 16 U.S.C. § 1633(b)(2)(B) (1988); 43 CFR 4750.3-2. This Board has held that a private maintenance and care agreement for a wild horse is properly cancelled and the horse is properly repossessed where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement by "inhumanely treating" the horse, in that it was allowed to suffer stress and injury resulting from action or inaction that was not compatible with animal husbandry practices accepted in the veterinary community. Thana Conk, supra. Further, the Board has upheld the cancellation of an agreement and repossession of a healthy animal where the adopter has breached the agreement in the treatment of another animal. Susan A. Moll, 101 IBLA 45, 50-51 (1988).

The basis asserted by BLM for the decisions appealed from is that the adopted animals were treated inhumanely ^{4/} and that termination of the adoption agreements and repossession of the animals is necessary to protect them. The record indicates that between approximately December 12 and 29, 1989, six adopted burros were found dead (Investigative Report of Special Agent Gary Olson (Case No. NM-040-01-90-021-016)). A memorandum in the BLM file dated December 13, 1989, discloses that George Gilchrist telephoned on December 12 to report the loss of an adopted burro. A report of a subsequent December 18 BLM compliance inspection of the Gilchrist property made by Don Galloway discloses the following observation: "3 Jennies in very poor shape. [George Gilchrist] is weaning foals. [He is a]lso moving Jack Burro that might be killing some of these animals." The report also stated that George Gilchrist indicated the animals will not eat alfalfa hay. The investigator was "very concerned about this situation" and concluded that a

^{4/} It has been recognized that this does not equate to a finding that the adopter has been deliberately cruel. E.g., Mary Magera, 101 IBLA 116, 119 (1988).

followup inspection was needed soon. In a report of a followup inspection on January 8, 1990, Inspector Galloway described the animals condition as follows: "Horses in good shape. Remaining burros still thin. On good feed being properly cared for. If it turns cold again will probably [lose] baby burro."

A report in the record by Pat Hoffman reveals that on February 1, 1990, blood samples were drawn from six of the adopted burros with the cooperation of George Gilchrist and the samples were delivered to veterinary doctors at Oklahoma State University. Regarding the condition of the animals, Pat Hoffman observed in his February 1, 1990, report:

The animals (wild Burro's) in Mr. Gilchrist care are thin. When asked Gilchrist stated that he was feeding the adult animals Alf. hay and the young weanling burros Alf. hay and grain. One of the young burros would not eat grain he stated. I informed Mr. Wade that the animals appear to be improving slightly and not [deteriorating] from * * * the last compliance check during the 1st part of Jan. 90.

We did not see the wild horses on this trip.

In a letter dated February 8, 1990, E. L. Stair, DVM, Chief Pathologist of the Oklahoma Animal Disease Diagnostic Laboratory, Oklahoma State University, reported the results of the blood tests on the adopted burros. Although the blood tests apparently did not indicate starvation or malnutrition, Dr. Stair opined:

[B]ased on the fact that 6 of these burros died during the recent cold spell in December 1989, and the fact that a burro from the same feeding lot * * * was observed to be malnourished and with-out any body fat stores at postmortem, [5/] it is my belief and professional opinion that there is significant cause to suspect starvation-malnutrition in the live burros represented by the samples submitted * * *.

Examination by veterinarians of the animals repossessed by BLM resulted in findings of "mild to moderate, chronic nutritional deficiency" (report of Dr. Jackson) and severe malnourishment of one young burro (report of Dr. James).

Appellants have asserted that all of the adopted animals were properly fed. Appellants contend that the animals were malnourished when adopted, that they did not adjust after adoption and refused feed, and that attempts to remedy the situation were unsuccessful through no fault of appellants.

5/ A postmortem examination was performed on a burro owned by George Gilchrist which died under suspicious circumstances. The findings were that the animal had been killed by lethal injection of magnesium sulfate.

It is pointed out that severe winter weather conditions occurred in the area during the time in question. Specifically, with respect to the two remaining horses for which BLM seeks to regain custody, counsel for appellants states in a June 1, 1990, letter to BLM that the "two animals which you seek are healthy animals." Appellants seek an evidentiary hearing and request that they be allowed to retain custody of the animals remaining in their possession, that the repossessed animals be restored to their custody, and that the animals that have died be replaced.

[2] "Inhumane treatment" is defined in the regulations as "any intentional or negligent action or failure to act that causes stress, injury, or undue suffering to a wild horse or burro and is not compatible with animal husbandry practices accepted in the veterinary community." 43 CFR 4700.0-5(f). Inhumane treatment of adopted animals is expressly prohibited in the terms of the adoption agreement and in the relevant regulations. 43 CFR 4770.1(f). Noncompliance with the terms of the adoption agreement may result in "cancellation of the agreement, repossession of wild horses and burros included in the agreement and disapproval of requests by the adopted [sic] for additional excess wild horses and burros." 43 CFR 4770.2(b). There is substantial evidence in the record to support the decision of BLM to repossess those animals recovered in February 1990 for their protection. Further, the death of six of the adopted animals and the observed malnutrition of the burros repossessed supports the decision to cancel the adoption agreement with respect to the two horses remaining in appellants' custody and the decision to repossess those remaining animals. The public interest in protection of these animals mandates putting the decision of BLM into effect to this extent.

We recognize, however, that the evidence is not without doubt as to whether the condition of the repossessed animals was the fault of the adopters or due to conditions outside their control. In this regard, we note that the burden is upon the adopter to establish that the cause of the animals decline was not attributable to any conduct on his part or to the failure to take necessary care of the animals. Thana Conk, *supra* at 276; Mary Magera, *supra* at 119. Further, there is virtually no evidence of the condition of the two adopted horses remaining in private custody which appellants contend are healthy. Where the record discloses the presence of issues of material fact necessary to resolution of the appeal on the merits, a hearing is properly ordered before an Administrative Law Judge. 43 CFR 4.415. In this context, we find it appropriate to place the BLM decision into effect on an interim basis and refer this case for an evidentiary hearing to allow appellants an opportunity to show cause why the BLM decision should not be affirmed. Thus, BLM is authorized to repossess the two horses currently in private custody pending the outcome of the hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is put into effect on an interim basis and the case is referred to the

Hearings Division for a hearing before an administrative law judge. The decision of the Administrative Law Judge shall be final for the Department in the absence of any appeal to the Board by a party adversely affected thereby.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge